

Adopt CHAPTER Env-Ws 1900 to read as follows:

CHAPTER Env-Ws 1900 RULES FOR THE PROTECTION OF INSTREAM FLOW ON DESIGNATED RIVERS

Statutory Authority: RSA 482:3, III; RSA 482:4; RSA 483:1; RSA 483:2; RSA 483:9, IV, V; RSA 483:9-a, V; RSA 483:9-aa, V; RSA 483:9-b; RSA 483:9-c, I; RSA 483:11, IV; RSA 485-A:4, I, V; RSA 485-A:8, VI

PART Env-Ws 1901 PURPOSE AND APPLICABILITY

Env-Ws 1901.01 Purpose. The purpose of these rules is to specify standards, criteria, and procedures by which a protected instream flow shall be established and enforced for each designated river or river segment in order to maintain water for instream public uses and to protect the resources for which the river or river segment is designated.

Env-Ws 1901.02 Applicability. The requirements set forth in Env-Ws 1900 shall apply to:

- (a) Designated rivers under RSA 483 and their tributary drainage areas;***
- (b) Affected water users; and***
- (c) Affected dam owners.***

PART Env-Ws 1902 DEFINITIONS

Env-Ws 1902.01 “7Q10” means the lowest average flow rate for a period of 7 consecutive days with an expected recurrence interval of once in every 10 years, determined at a fixed location on a river or stream, and expressed in terms of volume per time period.

Env-Ws 1902.02 “Affected dam owner” means an owner of a dam with an impoundment with a surface area greater than 10 acres in the watershed area of a designated river.

Env-Ws 1902.03 “Affected water user” means a water user required to be registered under Env-Wr 700 and having a withdrawal or return location within 500 feet of a designated river or within 500 feet of a river or stream in its tributary drainage area.

Env-Ws 1902.04 “Aggregate water use” means the total water use by all affected water users at and upstream from any location on a designated river, being the difference between the sum of water withdrawals required to be registered under Env-Wr 700 and the sum of measured registered water returns.

Env-Ws 1902.05 “Commissioner” means the commissioner of the New Hampshire department of environmental services.

Env-Ws 1902.06 “cfs” means cubic feet per second of flow per square mile of stream drainage area.

Env-Ws 1902.07 “Department” means the New Hampshire department of environmental services.

Env-Ws 1902.08 “Designated river” means a river or river segment that is designated under RSA 483.

Env-Ws 1902.09 “Governing body” means the board of selectmen in a town, the board of mayor and aldermen in a city or the council in a city or town with a council, or the county commissioners in unincorporated towns and unorganized places.

Env-Ws 1902.10 “Instream flow technical review committee” (IFTRC) means a committee established under Env-Ws 1907.01 to Env-Ws 1907.06.

Env-Ws 1902.11 “Lakes management advisory committee” (LMAC) means the committee established under RSA 483-A:6.

Env-Ws 1902.12 “Local river management advisory committee” (LRMAC) means a committee established under RSA 483:8-a.

Env-Ws 1902.13 “Rivers management advisory committee” (RMAC) means the committee established under RSA 483:8.

Env-Ws 1902.14 “Segment” means a portion of a designated river assigned to one of the classifications identified in RSA 483:7-a.

Env-Ws 1902.15 “Water management planning area” (WMPA) means the tributary drainage area to a designated river for which a water management plan is required.

Env-Ws 1902.16 “Water management planning area advisory committee” (WMPAAC) means a committee established under Env-Ws 1907. 07 to Env-Ws 1907.11.

PART Env-Ws 1903 GENERAL STANDARD AND DE MINIMIS AMOUNT

Env-Ws 1903.01 General Standard.

(a) The department shall assess aggregate water use versus streamflow for all designated river segments that do not have an established protected instream flow under Part Env-Ws 1905, using the general standard in (b) below.

(b) A designated river is in compliance with the general standard if:

(1) Average aggregate monthly water use does not exceed 5 percent of 7Q10 when average monthly stream flow is less than or equal to 0.5 cfs;

(2) Average aggregate monthly water use does not exceed 0.02 cfs when average monthly stream flow is greater than 0.5 cfs and less than or equal to 1.0 cfs;

(3) Average aggregate monthly water use does not exceed 0.04 cfs when average monthly stream flow is greater than 1.0 cfs and less than or equal to 4 cfs; or

(4) Average aggregate monthly water use does not exceed 0.16 cfs when average monthly stream flow is greater than 4 cfs.

Env-Ws 1903.02 Application of the General Standard to Hydroelectric Facilities.

(a) The general standard shall not apply to hydroelectric facilities for the river locations between their point of withdrawal and point of return.

(b) For a hydroelectric energy facility licensed by the Federal Energy Regulatory Commission on a designated river, the department shall establish the US Fish and Wildlife Service Interim Regional Policy for Aquatic Base Flow as the minimum release in any water quality certification, permit, or approval after expiration of the license in effect at the time of rule adoption, unless a different minimum release is specified in a water management plan prepared by the process in Env-Ws 1906.

(c) For a hydroelectric energy facility on a designated river, which has been granted an exemption from the Federal Energy Regulatory Commission licensing process, the department shall establish the US Fish and Wildlife Service Interim Regional Policy for Aquatic Base Flow as the minimum release in any water quality certification, permit, or approval after 30 years from the date of rule adoption or after the facility's existing power purchase contract expires, whichever is earlier, unless a different minimum release is specified in a water management plan prepared by the process in Env-Ws 1906.

Env-Ws 1903.03 De Minimis Amount Available For Use. *An aggregate water use at any location equal to 5 percent of 7Q10 at that location shall be a de minimis amount that is always available for use.*

PART Env-Ws 1904 PROTECTED INSTREAM FLOWS AND WATER MANAGEMENT PLANS

Env-Ws 1904.01 Establishment of Protected Instream Flows and Adoption of Water Management Plans. *The department, in consultation with the IFTRC and WMPAAC, shall establish scientific, study-based, protected instream flows on a designated river and adopt a water management plan for the WMPA if:*

(a) A designated river is not in compliance with the general standard;

(b) The department determines that a proposed or potential water withdrawal or other flow alteration will cause an adverse effect on any public instream use of a designated river; or

(c) The department has granted a request to establish protected instream flows under Env-Ws 1904.02.

Env-Ws 1904.02 Request to Establish Protected Instream Flows.

(a) The department shall consider establishing protected instream flows on a designated river and adopting a water management plan for a designated river or segment if a person requests establishment of protected instream flows.

(b) The request shall be in writing.

(c) The request shall include:

(1) The name, address, and daytime telephone number of the person requesting establishment of protected instream flows;

(2) If the person requesting establishment of protected instream flows is not an individual, the name of an individual who can be contacted on behalf of the requesting organization;

(3) A list of the outstanding characteristics identified in RSA 483:1, the resources identified in RSA 483:6, IV (a), and the instream public uses identified in RSA 483:9-c applicable to the river segment for which establishment of a protected instream flow is being requested;

(4) A summary of how establishment of protected instream flows would conserve and protect the factors identified under (3) above; and

(5) A full explanation of why protected instream flows should be established on the designated river;

(d) Within 30 days of receiving a request, the department shall either grant or deny the request.

(e) If the department believes that an oral hearing would facilitate making a decision to deny or grant the request, the department shall:

(1) Schedule a hearing; and

(2) Notify in writing the person who made the request, any other person who has requested to be notified, and the general public of the date, time, and place of the hearing.

(f) Any hearing so scheduled shall be conducted in accordance with Env-C 205 relative to non-adjudicative public hearings.

(g) The department shall grant the request if :

(1) The information in the request or other information reviewed by the department indicates that instream flows do not support an instream public use or a resource for which the river or segment is designated; or

(2) The LRMAC has submitted to the department a letter in support of the request.

(h) The department's decision shall:

(1) Be in writing;

(2) Be sent to the person who requested the instream flow to be established and to any other person who has asked to be notified of the decision in writing;

(3) Be made available electronically to the general public; and

(4) State the reason(s) for the decision, whether the decision is to deny the request or to establish protected instream flows.

(i) If the department grants the request, the department shall initiate the process for establishment of protected instream flows, within 30 days of the decision, by the process in Env-Ws 1905.

Env-Ws 1904.03 Sequence. The department shall establish scientifically-supported protected instream flows on a designated river prior to adoption of the water management plan for a WMPA.

PART Env-Ws 1905 PROCEDURE FOR ESTABLISHMENT OF PROTECTED INSTREAM FLOWS

Env-Ws 1905.01 Elements. To establish protected instream flows, as required by Env-Ws 1904.01 or 1904.02, the commissioner shall:

(a) Conduct a protected instream flow study and propose protected instream flows based on scientifically-accepted ecological methods as provided in Env-Ws 1905.02.

(b) Make the study available for public review;

(c) Hold a public hearing and receive comments on the study and the recommended protected instream flows as provided in Env-Ws 1905.03; and

(d) Issue a decision establishing protected instream flows for the designated river, as provided in Env-Ws 1905.04.

Env-Ws 1905.02 Protected Instream Flow Study. The protected instream flow study shall:

- (a) Identify and catalog segments, as defined by RSA 483:7-a, on the designated river;***
- (b) For each segment, identify and catalog outstanding characteristics listed under RSA 483:1 and other outstanding characteristics;***
- (c) For each segment, identify and catalog all instream public uses on the designated river listed under RSA 483:9-c.I, other instream public uses, and designated uses under the federal Clean Water Act;***
- (d) For each segment, identify and catalog all resources for which the river or segment is designated pursuant to RSA 483:6 IV a, and other resources.***
- (e) Identify and catalog all documents and reports relative to a segment's outstanding characteristics, the resources for which the river is designated, and instream public uses, including:***
 - (1) designated river nomination reports;***
 - (2) river corridor management plans;***
 - (3) water quality studies;***
 - (4) natural heritage inventory;***
 - (5) fishery and aquatic resource studies;***
 - (6) environmental assessments;***
 - (7) environmental impact statements; and***
 - (8) other applicable reports and documents;***
- (f) Include an on-the-water stream survey of all resources, that identifies and catalogs from direct observation:***
 - (1) fish;***
 - (2) wildlife;***
 - (3) macroinvertebrates;***
 - (4) plants;***
 - (5) recreational uses;***

(6) characteristics identified in (b) above;

(7) instream public uses identified in (c) above; and

(8) Resources identified in (d) above;

(g) Identify and document method(s) that are consistent with applicable designated uses and water quality standards, for establishing a protected instream flow for the outstanding characteristic, instream public use or resource identified in (b), (c), (d), and (f) above that has the greatest minimum flow requirement;

(h) For each segment, determine and document a recommended, scientifically-based protected instream flow based on application of the method(s) identified in (g) above, and applicable water quality standards; and

(i) For each segment classified natural under RSA 483:7-a, assess the effect on recommended protected instream flows of inclusion as an Outstanding Resource Water under the provisions of RSA 483:9.IV.

Env-Ws 1905.03 Publication, Hearing, and Opportunity for Public Comment on Protected Instream Flows.

(a) After the protected instream flow study has been prepared, and prior to establishment of protected instream flows for a designated river or segment, the department, in cooperation with the WMPAAC, shall make the study available for public review and hold a public hearing to receive comments.

(b) The department shall use the comments received during the public hearing and comment period to review the proposed protected instream flow relative to the following factors:

(1) The outstanding characteristics identified in RSA 483:1;

(2) The factors identified in RSA 483:6, IV(a);

(3) The instream public uses identified in RSA 483:9-c;

(4) Water quality standards;

(5) Flows established pursuant to existing federal energy regulatory commission licensing processes or state contracts;

(6) Whether there are wastewater discharges that require a certain instream flow for permit compliance or maintaining water quality standards;

(7) Whether the river contains flow-regulating structures such as dams, and if so, how such structures are used to manage flow;

(8) Information relevant to flow conditions that will conserve, protect, maintain, or restore aquatic life or habitat, or both;

(9) Information relevant to flow conditions that will conserve, protect, maintain, or restore recreational uses;

(10) Information relevant to flow conditions that will conserve, protect, maintain, or restore resources for which the river is designated;

(11) Stream gaging data;

(12) Watershed characteristics;

(13) Pertinent resource management plans including, but not limited to, fisheries management plans, watershed management plans, and recreation management plans; and

(14) Other information relevant to the proposed protected instream flows.

(c) The hearing shall be held in a community through or past which the designated river flows.

(d) At least 30 days before the hearing, the department shall issue a notice of hearing, including locations where a copy of the study may be obtained, in a newspaper of local circulation and on the department's website.

(e) At least 30 days before the hearing, the department shall send written notice of the hearing and study availability, and solicit comment from, the following:

(1) Affected water users in the WMPA;

(2) Affected dam owners in the WMPA;

(3) Federal energy regulatory commission, for each WMPA with a licensed or exempted hydropower site;

(4) LMAC members;

(5) LRMAC members for the designated river;

(6) The governing body of each municipality through or past which the designated river flows;

- (7) The national park service;*
- (8) The New Hampshire department of justice;*
- (9) The New Hampshire public utilities commission;*
- (10) RMAC members;*
- (11) The governor of any state which shares a designated river;*
- (12) The United States environmental protection agency;*
- (13) The United States fish and wildlife service;*
- (14) The United States forest service, for each designated river inside the white mountain national forest;*
- (15) The United States geological survey; and*
- (16) Persons who have requested in writing to be notified of the hearing.*

(f) At the public hearing, the department shall specify a comment period which shall close at least 30 days after the hearing date, during which time the department will receive written comments on the factors pertaining to the proposed protected instream flows.

Env-Ws 1905.04 Establishment of Protected Instream Flows.

(a) Within 60 days of the close of the public comment period, the department shall issue a decision establishing protected instream flows for the designated river.

(b) The decision shall:

- (1) Be in writing;*
- (2) State the scientific basis for the established flow(s);*
- (3) Include an assessment of how the established flows will meet applicable water quality standards;*
- (4) Include the assessment required by RSA 483:9-c, III;*
- (5) Summarize the comments received; and*
- (6) Explain how the comments affect the decision.*

(c) The department shall send copies of the decision to:

- (1) Persons identified in Env-Ws 1905.03(e);*
- (2) Persons who submitted written comments on the proposed flows; and*
- (3) Persons who requested to receive a copy of the notice of the established flows.*

Env-Ws 1905.05 Petition for Change of an Established Protected Instream Flow.

(a) A person may file a petition with the department for reconsideration or change of an established protected instream flow.

(b) If the petition is filed within 30 days of the date the decision is issued, the implementation of the decision will be stayed until the department has acted on the petition, in accordance with RSA 483:9-c, VI.

(c) The petition shall be in writing.

(d) The petition shall include:

(1) The name, address, and daytime telephone number of the person requesting change or reconsideration;

(2) If the person requesting change or reconsideration is not an individual, the name of an individual who can be contacted on behalf of the organization requesting the reconsideration;

(3) A clear and concise statement of the specific reconsideration or change of an established protected instream flow requested;

(4) A list of the outstanding characteristics identified in RSA 483:1, the resources identified in RSA 483:6, IV (a), and the instream public uses identified in RSA 483:9-c applicable to the river segment for which change or reconsideration of a protected instream flow is being requested;

(5) An explanation of how change or reconsideration of protected instream flows would conserve and protect the factors identified under (4) above;

(6) An explanation of how a change or reconsideration of protected instream flows would meet water quality standards;

(7) A full explanation of why protected instream flows should be changed or reconsidered on the designated river; and

(8) Any factors identified in (4) above, that the petitioner believes the department should re-evaluate;

(9) Data not available or not considered at the time the protected instream flow was established; and

(10) Other reasons for requesting reconsideration.

(e) Within 30 days of receiving a petition for reconsideration, the department shall:

(1) Deny the petition and affirm the established protected instream flow; or

(2) Grant the petition and begin reconsideration of the protected instream flow.

(f) If the department believes that an oral hearing would facilitate making a decision to deny or grant the petition, the department shall:

(1) Schedule a hearing; and

(2) Notify the petitioner in writing, and any other person who has requested to be notified, and the general public of the date, time and place of the hearing.

(g) Any hearing so scheduled shall be conducted in accordance with Env-C 205 relative to non-adjudicative public hearings.

(h) The department shall grant the petition if the information in the petition or other information reviewed by the department indicates that the established protected instream flows are not correct.

(i) The department's decision shall:

(1) Be in writing;

(2) Be sent to the person who petitioned for the change or reconsideration of the instream flow and to any other person who has asked to be notified of the decision in writing;

(3) Be made available electronically to the general public; and

(4) State the reason(s) for the decision, whether the decision is to deny the petition or to reconsider established protected instream flows.

(j) If the department grants the petition, the department shall establish revised protected instream flows by the process in Env-Ws 1905.01.

(k) As specified in RSA 483:9-c, VI, the commissioner's decision on the petition may be appealed in accordance with RSA 541.

(l) The department shall initiate action to reconsider a protected instream flow by the processes described in Env-Ws 1905.01 if there are changed conditions in the watershed that warrant re-evaluation of the flows.

PART Env-Ws 1906 PROCEDURE FOR ADOPTION OF WATER MANAGEMENT PLANS

Env-Ws 1906.01 Elements of a Water Management Plan.

(a) The department shall prepare a water management plan that sets forth how the protected instream flows established under Part Env-Ws 1905 for a designated river or segment shall be maintained.

(b) The water management plan shall include:

- (1) A conservation plan, as provided in Env-Ws 1906.02;*
- (2) A water use plan, as provided in Env-Ws 1906.03; and*
- (3) A dam management plan, as provided in Env-Ws 1906.04.*

(c) The department shall:

- (1) Notify each affected water user and affected dam owner in the WMPA that a water management plan is being prepared;*
- (2) Notify each affected water user and affected dam owner in the WMPA that the plan will be enforceable;*
- (3) Notify each affected water user that the water user is strongly encouraged to participate in the process by providing information that will help the department understand that user's water use;*
- (4) Notify each affected dam owner in the WMPA that the dam owner is strongly encouraged to participate in the process by providing information that will help the department understand their impoundment's operation and uses;*
- (5) Make the water management plan available for public review; and*
- (6) Conduct a public hearing and receive comments as provided in Env-Ws 1906.05.*

(d) The department shall issue a written decision as provided in Env-Ws 1906.07.

Env-Ws 1906.02 Conservation Plan.

(a) The department shall:

- (1) Prepare a conservation plan; and*
- (2) Meet with each affected water user and discuss protected instream flow requirements.*
- (b) The conservation plan shall:*
 - (1) Identify all affected water users in the WMPA;*
 - (2) Determine affected water user types within the WMPA, and identify conservation measures and best management practices applicable to each type of affected water user;*
 - (3) For each affected water user in the WMPA, include a report of water use patterns, needs, and the potential for conservation based on specific water-use data and information from department records, site visits, and interviews, which shall include the following information:*
 - a. A complete description of all water use including:*
 - 1. Water source(s) and destination(s);*
 - 2. Anticipated demand for water that describes maximum, minimum, and average water withdrawal rates, schedules, and durations;*
 - 3. Factors that control water demand such as consumer choice, delivery contracts, availability, crop needs, manufacturing runs, seasonal occupancy, and precipitation;*
 - 4. Projected growth or decline in the demand for water and a description of the factors that control the growth or decline in demand for water; and*
 - 5. A description of how the water is used including a description and a percent estimate of the total volume of water used for each applicable process or need.*
 - b. An evaluation of all water conservation opportunities employed, including:*
 - 1. An assessment of changes to historic water demand records;*
 - 2. Leak detection and repair activities;*
 - 3. Water audits and preventative maintenance programs;*
 - 4. Employee education pertaining to water conservation practices; and*

5. Other water conservation opportunities.

c. A detailed description of past and present water conservation efforts, effectiveness, and cost;

d. A description of water conservation best management practices and technologies applicable to the types of water-using processes;

e. A detailed summary of water conservation measures that may be implemented during the next 5 years including a quantitative estimate of the water savings associated with these measures;

f. An economic assessment of the cost to implement the water conservation plan; and

g. A detailed summary of any efforts to implement or develop new processes or technologies that may result in additional water conservation opportunities.

(4) Develop a conservation implementation plan and quantitative water use reduction targets by negotiating implementation of conservation measures with each affected water user, that include:

a. A description of water conservation measures to be implemented;

b. A schedule for the implementation of water conservation measures; and

c. A description of a process to monitor and evaluate the results of, and compliance with, the water conservation plan.

(5) The economic assessment in (3)f above shall:

a. Include an estimate of implementation costs of the conservation plan for each affected water user;

b. Incorporate the conservation implementation schedules in (4) above; and

c. Include any other identified economic factors not attributable to affected water users.

Env-Ws 1906.03 Water Use Plan.

(a) The department shall prepare a water use plan.

(b) The water use plan shall:

(1) Include the water use data and information collected under Env-Ws 1906.02(b)(3) to define water use patterns and needs of each affected water user within the WMPA;

(2) For each affected water user in the WMPA, include a report describing the potential for water use modification, sharing or both to meet protected instream flow requirements, including water use patterns and needs as determined in (1) above;

(3) With the assistance of the public utilities commission, assess the effect of the protected instream flow on each existing hydroelectric power facility within or upstream from the designated river or segment;

(4) For each affected water user in the WMPA include an individual water use plan so that the net effect of implementation of all individual plans, in coordination with implementation of the dam management plan, is maintenance of the protected instream flows; and

(5) For each affected water user in the WMPA include an implementation schedule for the individual water use plan.

(c) The department shall:

(1) Meet with each affected water user in the WMPA and discuss protected instream flow requirements.

(2) Mediate and guide negotiations among affected dam owners and affected water users and other applicable interests towards water use and dam management that will meet protected instream flow requirements; and

(3) Prepare an economic assessment of the cost to implement the water use plan.

(d) The economic assessment shall:

(1) Include an estimate of implementation costs of the plan for each affected water user;

(2) Incorporate the implementation schedules in (b)(5) above; and

(3) Include any other identified economic factors not attributable to affected water users.

Env-Ws 1906.04 Dam Management Plan.

(a) The department shall prepare a dam management plan.

(b) The dam management plan shall:

(1) Include data and information from department sources, site visits and interviews with each affected dam owner or their operator on characteristics and operational procedures of affected dams within the WMPA including:

- a. The name of the dam;***
- b. The name of the town where the dam is located;***
- c. The name, address and telephone number of owner, operator or both;***
- d. The emergency contact person and phone number;***
- e. The dam state ID number;***
- f. The dam status as either active or inactive;***
- g. The name of the water body impounded by dam and the downstream river;***
- h. The designated use(s) of the impoundment;***
- i. The elevation, in feet of the recreational pool or height relative to the lowest spillway;***
- j. The elevation, in feet of additional spillway crest(s) or height relative to the lowest spillway;***
- k. The elevation, in feet of streambed at the dam centerline or the height relative to the lowest spillway;***
- l. The elevation, in feet of the top of the dam or dam height relative to the lowest spillway;***
- m. The height of the dam in feet from toe to the highest point on the dam;***
- n. The freeboard, in feet;***
- o. The type and dimensions of spillway control(s) or outlet works;***
- p. The surface area, in acres of impoundment at maximum impoundment;***
- q. The drainage area, in square miles;***
- r. The maximum impoundment storage, in acre-feet;***
- s. The permanent impoundment storage, in acre-feet;***

- t. The estimated net effective storage, in acre-feet;*
- u. The maximum unoperated discharge, in cfs;*
- v. The design storm discharge, in cfs;*
- w. The estimated 50-year flood flow, in cfs;*
- x. The estimated 100-year flood flow, in cfs;*
- y. Any contractual obligations, minimum flow requirements and flowage rights;*
- z. An operation and maintenance plan summary;*
- aa. A description of any interests of riparian property owners to the impoundment; and*
- bb. A description of any water quality standards factors related to the impoundment;*

(2) For each affected dam in the WMPA, include a report describing the potential water available for release to maintain protected instream flows, the ecological and other impacts to the impoundment and downstream river reaches which may restrict the use of such waters for augmentation flows, and the potential for dam management to meet instream flow requirements, including dam operation patterns, physical structure, and needs as determined in (b) above;

(3) For each affected dam in the WMPA, include an individual dam management plan so that the net effect of implementation of all individual plans, in coordination with implementation of the water use plan, is maintenance of the protected instream flows; and

(4) For each affected dam in the WMPA, include an implementation schedule for the individual dam management plan.

(c) The department shall:

(1) Meet with each affected dam owner and lakefront interests to explain protected instream flow requirements;

(2) Mediate and guide negotiations among affected dam owners, affected water users, and other applicable interests toward water use and dam management that will meet protected instream flow requirements and the existing uses of the reservoirs; and

(3) Prepare an economic assessment of the cost to implement the dam management plan.

(d) The economic assessment shall:

(1) Include an estimate of implementation costs of the plan for each affected dam owner;

(2) Incorporate the implementation schedules in (b)(4) above; and

(3) Include any other identified economic factors not attributable to affected dam owners.

Env-Ws 1906.05 Water Management Plan Document.

(a) The department shall prepare a water management plan document defining the conservation measures and operational measures that will be implemented by each affected water user and affected dam operator in the WMPA to meet the protected instream flow requirements.

(b) The plan shall include an implementation schedule for each measure identified in (a) above.

(c) For affected water users engaged in agriculture or public water supply, the plan shall:

(1) Identify any local, state, or federal financial assistance programs that could provide funding for plan implementation;

(2) Estimate the amount of financial assistance available; and

(3) Estimate the schedule for receiving assistance.

(d) For affected water users engaged in agriculture or public water supply, the implementation schedule shall:

(1) Incorporate the availability and estimated schedule of financial assistance;

(2) Allow flexibility to account for unforeseen changes in availability and timetable of financial assistance, if the affected water user is engaged in a good faith effort to procure such assistance.

(e) The department shall make the draft water management plan available for public review at least 30 days before the hearing and opportunity for public comment as specified in Env-Ws 1906.06.

Env-Ws 1906.06 Hearing and Opportunity for Public Comment on Water Management Plans.

(a) Prior to adoption of a water management plan for a designated river or segment, the department, in cooperation with the WMPAAC, shall hold a public hearing to receive public comment.

(b) The department shall use the comments received during the public hearing and comment period to review the proposed water management plan relative to the following factors:

- (1) The outstanding characteristics identified in RSA 483:1;*
- (2) The resources identified in RSA 483:6, IV(a);*
- (3) Instream public uses identified in RSA 483:9-c;*
- (4) Water quality standards;*
- (5) The extent to which implementation of the water management plan will maintain the established protected instream flows;*
- (6) Whether there are affected water users or affected dam owners in the WMPA that have failed to provide information or participate in good faith in negotiations for development of the plan;*
- (7) The reasons affected water users or affected dam owners object to provisions of the proposed plan;*
- (8) Information relevant to conservation, water use, or dam operation which has not been considered in preparation of the proposed plan;*
- (9) Information relevant to implementation of the proposed plan;*
- (10) Other information relevant to the proposed plan.*

(b) The hearing shall be held in a community through or past which the designated river flows.

(c) At least 30 days before the hearing, the department shall issue a notice of the hearing in a newspaper of local circulation and send written notice of the public hearing to and solicit comment from the following:

- (1) Affected water users in the WMPA;*
- (2) Affected dam owners in the WMPA;*
- (3) The federal energy regulatory commission, for each designated river with a licensed or exempted hydropower site;*

- (4) LMAC members;*
- (5) LRMAC members for the designated river;*
- (6) The governing body of each municipality through or past which the designated river flows;*
- (7) The national park service;*
- (8) The New Hampshire department of justice;*
- (9) The New Hampshire public utilities commission;*
- (10) RMAC members;*
- (11) The governor of any state which shares a designated river;*
- (12) The United States environmental protection agency;*
- (13) The United States fish and wildlife service;*
- (14) The United States forest service, for each designated river inside the white mountain national forest;*
- (15) The United States geological survey; and*
- (16) Persons who have requested in writing to be notified of the hearing.*

(d) At the public hearing, the department shall specify a comment period which shall close at least 30 days after the hearing date, during which time the department will receive written comments on the factors pertaining to the proposed Water Management Plan.

Env-Ws 1906.07 Adoption of Water Management Plans.

(a) Within 60 days of the close of the public comment period, the department shall:

- (1) Review all comments received; and*
- (2) Revise the plan if, in the department's opinion, revision is warranted by testimony received.*

(b) The commissioner shall adopt the plan if:

- (1) The plan contains the 3 major elements described in Env-Ws 1906.01(b);*

- (2) The conservation plan contains goals and timelines for each affected water user;*
 - (3) Implementation of the conservation plan, water use plan and dam management plan will result in maintenance of the established protected instream flows; and*
 - (4) Implementation of the water use and conservation plans will enhance or not diminish the enjoyment of agriculture and public water supply as outstanding characteristics of the river or segment.*
- (c) The adoption shall:*
- (1) Be in writing;*
 - (2) Summarize comments received; and*
 - (3) Explain how the comments affected the final plan.*
- (d) The department shall send copies of the plan to:*
- (1) Persons identified in Env-Ws 1906.06(c);*
 - (2) Persons who submitted written comments on the draft plan; and*
 - (3) Persons who requested to receive a copy of the plan.*

Env-Ws 1906.08 Petition for Changes to an Adopted Water Management Plan.

- (a) A person may file a petition with the department for reconsideration or change of an adopted plan when:*
- (1) There is a new affected water user in the WMPA;*
 - (2) An existing affected water user desires to increase water use;*
 - (3) An existing affected water user has changes in timing of water use;*
 - (4) An existing affected water user has decreased water use; or*
 - (5) There are changes in water use or operating conditions for an affected water user or affected dam owner.*
- (b) If the petition is filed within 30 days of the date of adoption, the department shall stay the implementation of the adopted plan until the department has acted on the petition.*
- (c) The petition shall be in writing.*

(d) The petition shall include:

(1) The name, address, and daytime telephone number of the person petitioning for reconsideration or change;

(2) If the person petitioning for reconsideration or change is not an individual, the name of an individual who can be contacted on behalf of the organization petitioning for reconsideration or change;

(3) A clear and concise statement of the specific change being sought to the plan;

(4) An explanation of how the change to the adopted plan is consistent with maintenance of established protected instream flows and water quality standards;

(5) Documentation that all affected water users and affected dam owners to whom the change applies have agreed to the change, or if all have not agreed, an explanation of the reasons for failure to agree;

(6) If applicable, any factors the petitioner believes the department should reevaluate; and

(7) Data not available or considered at the time the plan was adopted.

(e) Absent a showing of good cause, the department shall not grant a petition for change or reconsideration that is based on information available to the requesting party when the water management plan was prepared, but not submitted to the department in a timely fashion.

(f) Within 30 days of receiving a petition for reconsideration, the department shall:

(1) Deny the petition and affirm the adopted plan; or

(2) Grant the petition and reconsider the provisions of the plan requested.

(g) If the department believes that an oral hearing would facilitate making a decision to deny or grant the petition, the department shall:

(1) Schedule a hearing; and

(2) Notify the person who filed the petition, any other person who has requested to be notified, and the general public of the date, time and place of the hearing.

(h) Any hearing so scheduled shall be conducted in accordance with Env-C 205 relative to non-adjudicative public hearings.

(i) The department shall grant the petition if the information in the petition or other information reviewed by the department indicates that criteria in (a) above for changes to a Water Management Plan are met.

(j) The department's decision shall:

(1) Be in writing;

(2) Be sent to the person who requested the instream flow to be established and to any other person who has asked to be notified of the decision in writing;

(3) Be made available electronically to the general public; and

(4) State the reason(s) for the decision, whether the decision is to deny the petition or to change the water management plan.

(k) If the department grants the petition, the department shall within 30 days of the decision, initiate hearing and opportunity for public comment on the requested changes and adoption of the plan by the processes described in Env-Ws 1906.06 and 1906.07.

PART Env-Ws 1907 ADVISORY COMMITTEES

Env-Ws 1907.01 Establishment of Instream Flow Technical Review Committee. Prior to beginning the protected instream flow study under Env-Ws 1905.02 the department, in consultation with the RMAC, shall appoint and convene an instream flow technical review committee (IFTRC) for the designated river.

Env-Ws 1907.02 IFTRC Composition.

(a) An IFTRC shall consist of at least 5 committee members.

(b) Membership shall include 2 representatives of the department.

(c) The department, in consultation with the RMAC, shall invite to be IFTRC members representatives of the following groups:

(1) One representative from New Hampshire department of fish and game;

(2) One representative of the United States environmental protection agency;

(3) One representative of the United States fish and wildlife service;

(4) One representative of the United States geologic survey;

(5) Up to 4 technical representatives selected by business interests; and

(6) Up to 4 technical representatives selected by conservation interests.

Env-Ws 1907.03 IFTRC Qualifications.

(a) An IFTRC member shall have either education or work experience in a scientific field related to instream flow protection.

(b) IFTRC members shall file a resume with the department summarizing education and work experience related to instream flow protection at or before the first IFTRC meeting.

Env-Ws 1907.04 IFTRC Duties. *The duty of the IFTRC shall be to advise the department on the preparation and conduct of the protected instream flow study.*

Env-Ws 1907.05 IFTRC Period of Service. *The committee shall serve until the department establishes the protected instream flow for the WMPA.*

Env-Ws 1907.06 IFTRC Meetings.

(a) The department shall schedule and convene IFTRC meetings.

(b) The IFTRC shall meet at least 3 times.

(c) The department shall provide administrative support for the committee.

Env-Ws 1907.07 Establishment of a Water Management Planning Area Advisory Committee. *Prior to establishing protected instream flows under Env-Ws 1905 for any designated river, the commissioner, in consultation with the RMAC, shall appoint and convene a water management planning area advisory committee (WMPAAC) for the designated river and its WMPA.*

Env-Ws 1907.08 WMPAAC Composition.

(a) All committee members shall be New Hampshire residents.

(b) A WMPAAC shall consist of at least 8 committee members.

(c) The department, in consultation with the RMAC, shall invite to be WMPAAC members representatives of the following groups:

(1) Two LRMAC representatives;

(2) Four representatives of affected water users in the WMPA;

(3) One conservation commission member from a town or city in the WMPA;

(4) One government official representative from a town or city in the WMPA;

- (5) One representative of recreational interests in the WMPA;*
- (6) One community citizen representative from a town or city in the WMPA;*
- (7) One representative of conservation interests in the WMPA;*
- (8) One representative of business in a town or city in the WMPA;*
- (9) One representative of a lake association in the WMPA;*
- (10) One public water supplier in the WMPA, if any;*
- (11) One affected dam owner in the WMPA; and*
- (12) One agricultural affected water user in the WMPA, if any.*

Env-Ws 1907.09 WMPAAC Duties. The duties of the WMPAAC shall be:

(a) To provide information to the department towards completion of a protected instream flow study conducted under Env-Ws 1905.02;

(b) To provide information to the department towards the completion of a water management plan conducted under Env-Ws 1906.01;

(c) To review and comment on the water management plan; and

(d) To assist the department in hearings, negotiations, and public meetings related to establishment of protected instream flows and adoption of water management plans.

Env-Ws 1907.10 WMPAAC Period of Service. The committee shall serve until the department adopts the water management plan.

Env-Ws 1907.11 WMPAAC Meetings.

(a) The department shall schedule and convene the first meeting.

(b) At the first meeting the committee shall elect a chair and vice chair.

(c) Subsequent meetings shall be at the call of the chair, or at the request of 3 or more committee members.

(d) The department shall provide administrative support for the committee.

PART Env-Ws 1908 ADMINISTRATION OF WATER MANAGEMENT PLANS

Env-Ws 1908.01 Compliance with Adopted Water Management Plan. Affected water users and affected dam owners shall comply with the provisions of an adopted water management plan.

Env-Ws 1908.02 Estimation of Aggregate Water Use.

(a) Each year the department shall estimate aggregate average monthly water use and average monthly stream flow for each designated river.

(b) Each year the department shall publish a report no later than June first.

(c) The report shall include:

(1) An estimate of water use for each affected water user;

(2) An estimate of aggregate water use at each withdrawal or return location;

(3) An estimate of stream flow at each withdrawal or return location;

(4) A record of the months and locations not in compliance with the general standard for designated rivers without established protected instream flows under Env-Ws Part 1906;

(5) A description of the WMPA for designated rivers that are not in compliance with the general standard; and

(6) For each designated river with protected instream flows established under Env-Ws Part 1906, a record of the dates and locations at which protected instream flows were not maintained.

Env-Ws 1908.03 Water Management Plan Priority List.

(a) The department, in consultation with the RMAC, shall prepare a priority list and a schedule for preparation of protected instream flows and water management plans.

(b) Highest priority shall be assigned to designated rivers on which average aggregate monthly water use at any location exceeds 15 percent of 7Q10 when average monthly streamflow is less than or equal to 0.5 cfs.

(c) Second highest priority shall be given to designated rivers on which average aggregate monthly water use at any location exceeds 10 percent of 7Q10 when average monthly streamflow is less than or equal to 0.5 cfs.

(d) Third highest priority shall be given to designated rivers on which average aggregate water use exceeds 5 percent of 7Q10 when average monthly streamflow is less than or equal to 0.5 cfs.

(e) Within the priorities identified in (b) through (d) above, the department shall consider the following factors in preparing the priority list:

- (1) The degree to which the general standard is exceeded;*
- (2) The likelihood of adverse effects on protected instream uses in that watershed;
and*
- (3) The location in the drainage basin relative to other watersheds for which a water management plan has been initiated.*

***Env-Ws 1908.04 Priority List Publication.** The department shall publish the priority list at least annually, in electronic format available on the internet.*

Env-Ws 1908.05 Initial Priority List and Determinations for Newly Designated Rivers.

(a) For rivers designated prior to the effective date of these rules, the department, in consultation with the RMAC, shall within 3 months of the effective date of the rules:

- (1) Determine if a water management plan is required; and*
- (2) Prepare an initial priority list and schedule.*

(b) For rivers designated after the effective date of these rules, the department, within 3 months of designation, shall:

- (1) Determine if a water management plan is required for any river or segment; and*
- (2) If a water management plan is required, prepare a revised priority list that includes the newly designated river.*

***Env-Ws 1908.06 Protected Instream Flows and Water Quality Criteria.** Protected instream flows established by the commissioner shall serve as water quality criteria for the purpose of administration of water quality standards by the department under the federal Clean Water Act.*

Env-Ws 1908.07 Compliance by Political Subdivisions.

(a) In response to an action by the department to compel compliance with these rules, if a political subdivision has chosen not to comply with section of these rules on the basis of the provisions of Part I, Article 28-a of the New Hampshire Constitution or RSA 541-A:25, an authorized official shall so notify the department in writing.

(b) The notification shall state:

(1) The specific rule, by section number, to which the political subdivision believes the provisions of Part I, Article 28-a or RSA 541-A:25 apply;

(2) The estimated amount of funding required by the political subdivision to comply with the rule;

(3) That the local legislative body of the political subdivision has considered and failed to appropriate funding to comply with the rule identified pursuant to (1) above; and

(4) The date the action in (3) above was taken.

(c) Within 30 days of receipt of a notification under (a) above, the department shall review the notification and respond in writing.

(d) The response shall state the results of the review, specifically:

(1) Whether the specific provisions of the rule identified by the political subdivision pursuant to (a) above implement a federal statute or regulation with which the political subdivision would otherwise be required to comply by the federal government;

(2) Whether the department believes that the specific provisions of the rule identified by the political subdivision pursuant to (a) above contains new, expanded, or modified programs or responsibilities compared to those in effect on November 28, 1984; and

(3) Whether the department believes that the state has provided or will provide funding to the political subdivision in order that the political subdivision can comply with the rule.

(e) If the department determines that the political subdivision is excused from complying with sections of the rule identified in (a) above based on Part I, Article 28-a or RSA 541-A:25, the department shall issue a notice in writing to the political subdivision that the department will not take action against the political subdivision to compel compliance with the rule or to impose penalties for failing to comply.

PART Env-Ws 1909 WAIVERS

Env-Ws 1909.01 Waivers

(a) The rules contained in this part are intended to apply to a variety of conditions and circumstances. It is recognized that strict compliance with all rules prescribed herein might not fit every conceivable situation. Affected persons may request a waiver of specific rules outlined in this part in accordance with paragraph (b) below.

(b) All requests for waivers shall:

(1) Be submitted in writing to the department; and

(2) Include the following information:

a. A description of the designated river and water use, instream public use or resource to which the waiver request relates;

b. A specific reference to the section of the rule for which a waiver is being sought;

c. A full explanation of why a waiver is necessary and demonstration of the effect caused if the rule is adhered to;

d. A full explanation of the alternatives for which a waiver is sought with supporting data; and

e. A full explanation of how the alternatives for which a waiver is sought are consistent with the intent of RSA 483:9-c, would have a just result, and would adequately protect human health and the environment.

(c) The department shall grant a waiver if the department finds that the alternatives proposed are at least equivalent to the requirements contained in this chapter, meet water quality standards, and are adequate to ensure that the provisions of RSA 483:9-c are met.

(d) The department shall not grant any waiver that contravenes the intent of any rule.

(e) The department shall issue a written response to a request for a waiver.

(f) If the waiver is denied, the department shall specifically set forth the reason(s) for the denial.

(g) The department shall grant a waiver for a specific time period not to exceed 10 years.